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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-989

In the Matter of the Petition

of

MANUEL ALEMAN, next friend of DAVID ALEMAN, infant,

Petitioner-Appellant,

against

JULE M. SUGARMAN, as Commissioner of the New York City Department of Social Services,

Respondent-Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Statement

In a habeas corpus proceeding arising from a state neglected child proceeding, the petition seeks a writ of certiorari to review an order of the Court of Appeals, Second Circuit, entered October 18, 1972, which unanimously affirmed an order of the District Court for the Southern District of New York (WEINFELD, J.), entered April 5, 1972, that dismissed the petition.

Issues

The issue is whether a party who brings a state habeas corpus proceeding may bypass it and seek federal habeas corpus. The District Court held no, citing 28 U.S.C. § 2254(b) and many cases for the settled rule that a petitioner must exhaust his state remedies, including appeal, before seeking federal habeas corpus relief. Its determination was affirmed without opinion.

Facts

(1)

On May 21, 1971, the New York City Department of Social Services brought a neglect petition for the protection of an infant, David Aleman (8a-10a).* The petition alleged (9a):

> "Child is likely to suffer serious harm in that respondent mother has a serious psychiatric problem. Has been diagnosed as schizophrenic and psychotic. Since the birth of David May 15, 1971, mother has displayed marked agitation, suspiciousness, paranoia, rapid mood change, and even while feeding the infant has been observed from giggling to depression to sleep. Mother has been on 24 hour suicide watch since May 18, 1971. Mother has three (3) children in addition to the infant David, and these children were found to be neglected children by this Court and are currently in foster homes through McMann [*sic*] Shelter. Respondent father has in the past appeared and disappeared for extended periods of time, has not been employed since 1965, and has indicated he may leave again as soon as things settle down."

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* Parenthetical references with suffix "a" ar to appellant's appendix in the Circuit Court. Parenthetical references without suffix are to appellant's appendix to this Court.

(2)

Hearings were held on July 14 and July 29, 1971. Both parents attended with counsel (2, 19).

Dr. Van Daele, a psychiatrist, testified that he had been seeing the mother since August 1970, following her discharge from Metropolitan Hospital. He had received a history from the hospital that the mother had struck and injured her child Manuel at a time when he was two months old while attempting to hit another child (2-3). The hospital diagnosis was schizophrenia, paranoid type (3). Dr. Van Daele's diagnosis was the same (*id.*). He said that return of one child, Manuel, would help the mother. He testified that, although the mother had shown some improvement, it was always possible that she would suffer recurring episodes, which would place her children at risk (4).

At a further hearing on July 29, 1971, testimony and a record were received in evidence of a previous proceeding in which three older children (Belinda, age 8; Esperanza, 6, and Manuel, now 14 months) were found to be neglected children (5).

The mother did not testify (6). Counsel for the petitioner, the father, made several motions to dismiss the neglect petition involving David on grounds of lack of jurisdiction, statutory vagueness and violation of rights under the First Amendment (35a).

The motions were denied, and the petitioner took the stand (6). He acknowledged that he was the father of David, Manuel and Esperanza (*id.*). He testified that he had been away at sea and had returned to New York in November 1970 (*id.*).

The Family Court found (7):

> "The entire record establishes by a preponderance of the evidence that the mother has been and continues

to be a mentally ill person subject to mood swings, depressions and actions that put her children at risk. The father has been in and out of the family life and there is no evidence that he has provided or will provide a suitable home for the children.

"Finding of neglect is made and the child David is adjudged a neglected child. Probation investigation is ordered and the remand of the child is continued for dispositional hearing September 16, 1971."

At the dispositional hearing the petitioner testified that he was living with the mothe and caring for her (9). Upon return to him and his wife of the children, he intended to return to Puerto Rico (10). His affidavit elucidates his testimony, stating that he intends to go back to Puerto Rico where his family can help take care of the wife while he goes back to work (17). His job is in the merchant marine (16).

Family Court held (11):

"The record in this case and the appearance of the mother establish beyond any doubt that the home of the father and the mother is surely not a home in which adequate care, mothering, or even minimum supervision needed by David can be provided."

(3)

The order of disposition entered December 31, 1971, following this hearing, placed the child in custody of the Department of Social Services (22a). He is being cared for in the McMahon Shelter (17a).

The mother filed a notice of appeal from the dispositional order of Family Court, but she has not perfected it. The petitioner applied to the Supreme Court, New York County, for a writ of habeas corpus. On March 9, 1972, the Supreme Court transferred the petition to the Family

Court (35a), pursuant to New York State Constitution, Art. 6, § 13, par. c, and the Family Court Act, § 651. On March 23, 1972, the petitioner applied to the District Court, Southern District, for a writ of habeas corpus.

Decisions Below

The District Court denied the petition. The opinion of Judge WEINFELD pointed out that petitioner's state habeas corpus proceeding has not been perfected by him and that, if a disposition of it adverse to him had been made by Family Court, the petitioner could have appealed to the Appellate Division. "Obviously it is to be considered with the still pending appeal taken by his wife from the Family Court order," the Court said (27).

Noting that the father was unwilling to wait for the Family Court disposition and New York appellate procedures, and sought habeas corpus in the federal court, the Court stated (28):

> "It is surely hornbook law by now that a petitioner must exhaust his state remedies including appeal before seeking federal habeas corpus relief. Considerations of comity and respect for state procedures require that the state courts be given the opportunity to correct any constitutional errors."

The opinion said that the petitioner might yet succeed in the Family Court and in any event had not exhausted state appellate procedures. It added (29):

> "While petitioner attempted to explain his bypass of the New York courts upon a claim that time is too critical for resort to them, there is no indication that New York, has been dilatory in its procedures; indeed, any delay in New York's appellate review may be the result of the petitioner's decision to move by petition for habeas corpus rather than taking a direct appeal,

and by his failure to perfect the proceeding in the Family Court, as acknowledged upon the argument of this petition. There is no reason to believe that petitioner will not receive prompt appellate adjudication of his claims in the New York courts if he so desires." [Citing New York CPLR 5521; cf. New York Family Court, Act, § 1112].

On appeal, the Second Circuit affirmed unanimously, without opinion.

Statute

28 United States Code § 2254 provides in pertinent part:

"§ 2254 state custody; remedies in federal courts.

• • •

(b) An application for a return of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

ARGUMENT

Habeas corpus relief was properly denied where petitioner has failed to exhaust state remedies.

(1)

This brief maintains that certiorari should be denied because this case presents no novel or substantial Federal question. It is well settled that a petitioner must exhaust his state remedies before seeking federal habeas corpus. 28 U.S.C. § 2254(b); *Ex Parte Hawk*, 321 U.S. 114, 116-117

(1944); *Nelson* v. *George*, 399 U.S. 224, 229 (1970); *Picard* v. *Connor*, 404 U.S. 270, 275 (1971); *United States ex rel. Molinas* v. *Mancusi*, 370 F. 2d 601 (2nd Cir., 1966), cert. den. 386 U.S. 984 (1967); *United States ex rel. Griffin* v. *Martin*, 409 F. 2d 1300 (2nd Cir., 1969); *United States ex rel. Carter* v. *York*, 430 F. 2d 1329 (2nd Cir., 1970).

Petitioner has failed to satisfy this requirement. His state habeas corpus petition, referred by the New York Supreme Court to the Family Court (a State Court), pursuant to New York State Constitution, Art. 6, § 13, par. c, and Family Court Act, § 651, is still pending. Should it be decided adversely to him, he could appeal to the Appellate Division, First Department, and to the New York Court of Appeals. As the District Court noted (27), such an appeal could be joined with the mother's pending appeal to the Appellate Division.

Thus, the state courts would have "the initial opportunity to pass upon and correct" the alleged violations of federal rights. Absent such an initial opportunity, it would be contrary to federal policy and "unseemly to our dual system of government" for the federal District Court to consider habeas corpus. *Picard* v. *Connor, supra,* 404 U.S. 270, 275.

(2)

Conceding these principles, petitioner's brief seeks to avoid them and excuse his neglect to pursue state remedies upon grounds which are incorrect and ineffectual as a matter of law and fact.

Petitioner maintains that he will not receive a fair hearing before the Family Court. It is scandalous to argue that the multi-part Family Court, upon a lawful constitutional referral from the State Supreme Court, will neglect its duty of considering afresh the contentions raised by the habeas corpus petition. The statement in petitioner's brief (p. 24) that the same Family Court judge

who heard the original proceeding is likely to hear the State habeas corpus motion is casuistry. As petitioner's counsel undoubtedly knows, Judge POLIER has retired. In any event, petitioner does not and cannot allege that the state's appellate courts will not grant a full and fair review.

Similar conclusory contentions, that pursuit of state remedies would be in vain and that therefore federal habeas corpus should issue forthwith, have been advanced and rejected many times. *Cruysen* v. *Scudder*, 215 F. 2d 512 (9th Cir., 1954); *Dana* v. *Tracy*, 360 F. 2d 545 (1st Cir., 1966); *United States ex rel. Storch* v. *Maroney*, 231 F. Supp. 385 (D.C. Pa., 1964). Mere anticipation of an adverse decision or the lack of probability of success will not excuse a failure to exhaust state remedies. *Boyd* v. *State of Oklahoma*, 375 F. 2d 481 (10th Cir., 1967); *Oliver* v. *State of California*, 364 F. 2d 311 (9th Cir., 1966); *United States ex rel. Touhy* v. *Ragen*, 224 F. 2d 611 (7th Cir., 1955).

(3)

The petitioner also claims that the exhaustion doctrine should be disregarded because pursuit of his remedies in the state courts would involve delay. However, as District Court pointed out, there was no showing that the state courts had been dilatory, and the petitioner acknowledged on oral argument that his own decision to move by habeas corpus rather than direct appeal, complicated by the failure to perfect the habeas corpus proceeding in the Family Court, may have created delay (29).

Where the need for expeditious review is urgent and counsel for the appellant acts appropriately, the New York appellate courts provide extremely rapid review. A number of election cases have moved from *nisi prius* court decision to Court of Appeals decision within a week. Other types of cases where speed was of the essence have, at times, taken little longer. There are indications that the petitioner in this matter could, had he sought it and

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had his counsel taken the proper steps, have obtained a rapid review by the State courts.

For example, in *Matter of Gary*, 37 AD 2d 932 (1st Dept. 1971), where a parent in a neglect proceeding raised jurisdictional issues similar to those raised here, an appeal from a Family Court order of June 1, 1971 was decided November 4, 1971 by the Appellate Division (a period of five months despite summer recesses). In *Scarpetta* v. *Spence-Chapin Adoption*, 28 NY 2d 185 (1971), cited by the petitioner, a November 24, 1970 order of the Supreme Court was decided by the New York Court of Appeals on April 7, 1971 (about four months).

By contrast, the petitioner, who brought the instant federal habeas corpus on or about March 22, 1972, was denied relief by the District Court April 5, 1972. His counsel did not seek a stipulation concerning the appendix until early in June, 1972, and the appeal was heard and decided in the September 1972 term of Circuit Court. The instant petition for certiorari will necessarily involve further delay. It is noteworthy that the order of the Second Circuit is dated October 18, 1972, and that the petition for certiorari was not served on this office until January 15, 1973. Therefore, it is apparent that he would have obtained a quicker determination if he had assiduously pursued his state remedies, as did the parties in the *Gary* and *Scarpetta* cases.

In any event, mere anticipation of delay in state habeas corpus or other post-decisional proceedings is not grounds for bypassing the state courts. *Baldwin* v. *Lewis*, 442 F. 2d 29 (7th Cir., 1971); *Allen* v. *Leeke*, 328 F. Supp. 292 (D.C., S. C. 1971).

(4)

As an excuse for his delay, the petitioner pleads inability to obtain transcripts of previous hearings in the Family Court. However, the questions of jurisdiction and constitutionality which he seeks to raise by habeas corpus do not

necessarily require these transcripts as his brief below indicated (p. 16).

Counsel asserts that he ordered the transcripts. But his affidavit (19) alleges nothing as to the follow-up steps he took to obtain them; nor does it delineate petitioner's need of them. This is insufficient. A party raising such an argument must factually show that he pursued all state avenues to secure the records and why they are necessary for the particular issues he seeks to raise. *Briggs* v. *State of Missouri*, 321 F. Supp. 649 (D.C., Mo., 1971); see also *Cruysen* v. *Scudder*, 215 F. 2d 512 (9th Cir., 1954); *Johnson* v. *Midlebrooks*, 383 F. 2d 386 (5th Cir., 1967).

It should be pointed out that ordinarily there does not appear to be any problem in obtaining transcripts from the Family Court promptly. This office regularly handles many matters in that court. While it rarely orders a transcript, when it has ordered one it has been provided quickly, sometimes within a few days. In addition, the Legal Aid Society handles many Family Court cases in which this office is its adversary. Repeatedly we have been shown transcripts obtained by the Legal Aid Society within a week or two after a hearing in that Court was completed.

(5)

While we see no reason why there should be any inordinate delay in deciding the petitioner's state habeas corpus proceeding and appeals from it, provided petitioner pursues his remedies efficiently, we cannot agree with the theory of his brief that speed is the primary consideration here. The primary consideration in a case involving neglect is the welfare of the child. Family Court Act, § 1011; *Matter of Desiree T.*, 64 Misc 2d 28, 34 (Fam. Ct., Kings Co., 1970).*

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* Petitioner's brief (p. 26) challenges this position, but it inconsistently quotes, with approval (p. 16), language to the same effect in a concurring opinion in *May* v. *Anderson*, 345 U.S. 528 (1953).

In the instant case, involving a mentally disturbed mother and a frequently absent father, a too hasty decision holds the potential of tragic consequences to the infant. Petitioner would place an unreasonable burden upon the District Court when he demands a bypassing of state due process and a summary disposition under these circumstances.

(6)

Petitioner cites *Fay* v. *Noia*, 372 U.S. 391 (1963). The unusual facts in that case were that Noia, sentenced to life for first degree murder, did not appeal the conviction, apparently because of fear that he might be sentenced to death if retried. However, his co-defendants did exhaust their appeal and other state remedies and eventually were freed by federal habeas corpus on the grounds of coerced confession. At this point, Noia sought relief in the state courts only to be met by the circumstance that his time to appeal had long expired and that coram nobis was not available, absent an appeal. This Court ultimately granted him habeas corpus, stating that state avenues were no longer available to Noia when he sought federal habeas corpus. The Court said (372 U.S. 435):

> "We hold that § 2254 is limited in its application to failure to exhaust state remedies still open to the habeas corpus applicant at the time he files his application in District Court."

This erodes petitioner's position. The state habeas corpus which he initiated and then neglected is still pending. Any subsequent appeals arising from it are still open to him. He, therefore, cannot escape the rule that a party who applies for state post-decisional relief must complete that course before turning to federal District Court. *United States ex rel. Brabham*, 282 F. Supp. 105 (D.C., Pa., 1968).

In *Lucas* v. *State of Michigan*, 420 F. 2d 259 (6th Cir., 1970), cited by the petitioner, the Court of Appeals waived

the requirement of exhaustion where there was a distinct line of cases in the state's highest appellate court contrary to petitioner's position that the search and seizure provision of the Michigan Constitution was in conflict with the United States Constitution, Fourth Amendment. In the instant case the petitioner does not contend that the New York Court of Appeals has adopted a fixed position on the issues he would raise.

The issue of denial of counsel that petitioner seeks to raise is not present in the case at bar which involves only the child David, for petitioner admittedly had counsel in this case (19). In any event, petitioner's brief (p. 14), by citing *Matter of Beaton*, 30 NY2d 352 (1972), concedes that the New York State Court of Appeals can and will give due consideration to such an issue, if properly raised.

Stanley v. *Illinois*, 405 U.S. 645, 92 S. Ct. 1208 (1972), also cited by petitioner, holds that an unmarried father cannot be denied custody of his child without a hearing. This has no application to the instant case where the record shows that there were several hearings at which the petitioner appeared with counsel.

CONCLUSION

The petition for a writ of certiorari should be denied.

February 13, 1973

Respectfully submitted,

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